IN THE COURT OF APPEALS OF IOWA

No. 2-579 / 12-0027 Filed September 6, 2012

MENARD, INC. and ZURICH AMERICAN INSURANCE,

Petitioners-Appellees/Cross-Appellants,

VS.

JAMES JONES JR.,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

James Jones Jr. appeals, and his employer and its insurer cross-appeal, a district court judicial review ruling affirming in part, reversing in part, and remanding the decision of the workers' compensation commissioner. **AFFIRMED ON BOTH APPEALS.**

David D. Drake of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des Moines, for appellant/cross-appellee.

Charles A. Blades of Scheldrup, Blades, Schrock, Smith, Aranza, P.C., Cedar Rapids, for appellees/cross-appellants.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Menard, Inc., its insurer, Zurich American Insurance (collectively Menards), and Menards's employee, James Jones Jr., seek further judicial review of a workers' compensation decision. Menards contends the district court erred in affirming the agency's determination that Jones had yet to reach maximum medical improvement. Jones contends the district court erred in reversing the agency's calculation of his weekly compensation rate.

I. Background Facts and Proceedings

Jones, a recipient of social security retirement benefits, was hired by Menards to help stock shelves. He worked five days a week for four hours a day and was considered a part-time, hourly-wage employee. Approximately six weeks after Jones began working, he sustained a work-related injury to his lower back.

Several years earlier, Jones had injured his lower back at another job. He underwent surgery and rehabilitation for that injury and was released from his physician's care with certain lifting restrictions. Jones did not disclose the injury or restrictions in his Menards job application because, at the time he applied, he said he felt better than he had in a decade. He testified that when he injured his back at Menards, he was not being treated for the earlier injury and was taking no medications to alleviate pain from that injury.

Following his injury at Menards, Jones consulted an orthopedic surgeon, who found no need for surgery and referred him to a rehabilitation and pain specialist. This specialist opined the injury was an exacerbation of his previous

back condition. He recommended physical therapy and pain medication.

Neither was helpful in easing Jones's back pain.

After Menards received confirmation from the specialist that Jones's pain was due to his preexisting back condition, the insurer refused to approve further treatment.

Jones filed a petition with the Iowa Workers' Compensation Commissioner alleging he suffered an injury to his "low back—body as a whole" while working for Menards. Menards stipulated that Jones's injury arose out of and in the course of his employment but disputed the extent and permanency of that injury. Menards also disputed the rate of compensation.

Following an arbitration hearing, a deputy workers' compensation commissioner determined that Jones had not yet reached maximum medical improvement. The deputy awarded Jones healing period benefits, calculated under lowa Code section 85.36(9) (2009).

Menards filed an intra-agency appeal. The commissioner affirmed and adopted the deputy's decision, as written. Menards then sought judicial review.

The district court affirmed the agency's finding that Jones had yet to reach maximum medical improvement, but reversed the rate calculation under section 85.36(9), determining there was no evidence to support the application of that provision. The court remanded the case to the agency for a recalculation of Jones's benefits under an alternate provision.

II. Analysis

As noted, each side raises a distinct issue: Menards asserts the agency erred in finding Jones had yet to reach maximum medical improvement, and

Jones asserts the district court erred in reversing the agency's rate calculation under section 85.36(9). Both issues implicate our substantial-evidence standard of review. See Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 306 (Iowa 2010) (reviewing finding that claimant had reached maximum medical improvement for substantial evidence); Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 134 (Iowa 2010) (reviewing calculation of benefits under section 85.36(9) for substantial evidence).

"Substantial evidence" means the "quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." lowa Code § 17A.19(10)(f)(1).

A. Maximum Medical Improvement

Our workers' compensation law distinguishes between temporary and permanent disability. See Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010). Temporary benefits are payable during a period of healing accompanied by a loss of wages. *Id.* Permanent benefits are payable only after the condition has stabilized, "i.e., when 'it is medically indicated that significant improvement from the injury is not anticipated." Broadlawns Med. Ctr., 792 N.W.2d at 307 (quoting Iowa Code § 85.34(1)). A claim for permanent disability benefits is therefore not ripe until maximum medical improvement has been achieved. Bell Bros., 779 N.W.2d at 201.

The agency determined Jones had not achieved maximum medical improvement. Adopting the findings of the deputy workers' compensation

commissioner, the agency cited the recommendations of two physicians who completed independent medical examinations of Jones. The agency stated that both "recommended further treatment for claimant, indicating he is indeed not yet at maximum medical improvement." This finding is supported by substantial evidence.

The examiner chosen by the employer stated Jones would benefit from "appropriate back rehabilitation, which he has not had." He suggested placing Jones "into an aggressive mobilization and stabilization exercise program with possibly a TENS unit." He also opined that "after appropriate treatment his symptoms will get back down to a baseline level." Although he later qualified this recommendation by suggesting "the additional treatment . . . was intended to provide symptomatic relief . . . and did not change maximum medical improvement," the agency gave little credence to this "clarification" prepared by counsel and signed by the physician. This was the agency's prerogative. *Cedar Rapids Cmty. Sch. Dist.*, 807 N.W.2d 839, 847 (lowa 2011).

The physician's original recommendation for further treatment coincided with the recommendation of the examiner chosen by Jones. This physician called for further evaluation to determine whether Jones had an entrapped nerve root or instability near two discs in his spinal cord.

Menards asks us to reweigh this evidence. That is not our role. See Arndt v. City of Le Claire, 728 N.W.2d 389, 394 (lowa 2007) ("Making a determination as to whether evidence 'trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence is not an assessment for the district court or the court of appeals to make when it

conducts a substantial evidence review of an agency decision."); see also Westling v. Hormel Foods Corp., 810 N.W.2d 247, 254 (Iowa 2012) ("It is not the role of the district court or the appellate courts to reweigh the evidence."). As the agency finding of maximum medical improvement is supported by substantial evidence, we decline to reverse it.

B. Calculation of Weekly Compensation Rate

We turn to Jones's contention that the district court erred in reversing the agency's rate calculation under Iowa Code section 85.36(9). That provision states:

If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

The district court concluded the record lacked substantial evidence to support the application of this provision. The court reasoned as follows:

The provision found in subsection 9 requires a finding that the employee was earning nothing, or less than the usual full-time employee in that field. . . .

... [T]here is no evidence in the record of the usual weekly earnings of other workers in [Jones's] field. . . . The Commissioner relies upon the fact that Jones worked four hours per day, as shown by Menards's own records. The number of hours worked is not determinative of this issue. . . . The true inquiry is into wages earned. No evidence on this subject is discussed by the commissioner or contained in the record.

Jones contends the court got it wrong. He points to the following evidence which, in his view, supports the agency's use of section 85.36(9): (1) Jones "applied for and was hired for part-time work with the defendant Menards," as shown by his pre-employment questionnaire and job application, (2) Jones

"testified that he was sure that Menards had full-time people working at the store, but that he was going to work part-time so he could be home early in the morning to care for his wife," (3) Menards admitted in an answer to an interrogatory that Jones "wasn't eligible for profit sharing because he was a part-time employee," and (4) at the hearing, Menards "offered no explanation as to how to calculate the claimant's weekly rate."

The evidence Jones cites would be relevant if the only showing required to invoke section 85.36(9) was a showing that he was a part-time employee. But the Iowa Supreme Court recently emphasized that a finding of part-time employment is not sufficient. *See Swiss Colony, Inc.* v. Deutmeyer, 789 N.W.2d 129, 134 (Iowa 2010).

In *Swiss Colony*, the commissioner found that a claimant who worked an average of thirty hours a week was a part-time employee because "the vast majority of all industries in this state view 40 hours a week as full-time." *Id.* at 135. The court rejected this rationale, reasoning that "in section 85.36(9), the legislature necessarily recognized that the forty-hour week is not the standard for *every* industry within the state by making 'earnings' the operative factor." *Id.* The court stated "section 85.36(9) distinguishes full- and part-time employees on the basis of weekly earnings, not the number of hours worked per week." *Id.* Based on a plain reading of the statute, the court determined the commissioner was obligated to make "a preliminary factual finding that the employee either (1) earns no wages or (2) earns less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality." *Id.* at 134 (citations omitted).

That preliminary finding was not made here. The agency simply found that Jones, "who worked four hours per day, was clearly a part time worker, as shown by Menards's own records." Based on *Swiss Colony*, this finding was not enough to support the application of section 85.36(9). *Cf. Stines v. Farmers Lumber & Supply Co.*, 100 N.W.2d 415, 415–16 (lowa 1960) (affirming wage calculation under what is now section 85.36(9) where parties stipulated to "the usual daily wage or earning of an adult day laborer in the locality and industry in which the decedent . . . was employed"); *accord Shuttleworth v. Interstate Power Co.*, 251 N.W. 727, 728–29 (lowa 1933).

In reaching this conclusion, we acknowledge that Jones's argument has logical appeal, as a reasonable fact finder could assume that an employee who was semi-retired and was paid on an hourly basis, as Jones was, earned less than Menards's full-time laborers. Indeed, in a similar situation, this court upheld the commissioner's application of section 85.36(9) based only on a finding that a "semi-retired worker would earn less than a person who is available full-time." See Lopez v. Midstates Horse Shows, Inc., No. 08-1714, 2009 WL 3337614, at *6 (Iowa Ct. App. Oct. 7, 2009). However, the court did not have the benefit of Swiss Colony. In addition to its other pronouncements, quoted above, the court in Swiss Colony stated, "[T]he principle of liberal construction does not vest this court with an editor's pen with the power to add or detract from the legislature's handiwork. Had the legislature intended to establish the forty-hour week as standard for full-time employment it could have done so." 789 N.W.2d at 135.

The district court correctly determined there was no evidence in the record of the usual weekly earnings of regular full-time adult laborers in Jones's field.

Accordingly, we affirm the court's reversal of the agency's rate calculation under section 85.36(9). We also affirm the court's decision to remand the issue to the agency to calculate Jones's benefits under section 85.36(7). See Id. at 136.

III. Disposition

Menards raises a second issue that was factually raised during its cross-examination of Jones but was not legally argued by Menards or decided by the agency: whether the agency erred in refusing to bar Jones's compensation claim because he did not disclose his prior back injury in his job application. It is axiomatic that issues must be both raised and decided by the agency to be preserved for our review. See KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 329 (Iowa 2010) ("When an agency fails to address an issue in its ruling and a party fails to point out the issue in a motion for rehearing, we find that error on these issues has not been preserved."); Meads v. Iowa Dep't of Social Servs., 366 N.W.2d 555, 559 (Iowa 1985) ("The district court may only review issues considered and decided by the agency."). As this issue was not decided by the agency, we decline to address it.²

¹ Iowa Code section 85.36(7) states:

In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

² Even if Menards had properly raised the issue, the agency rejected the underlying premise that Jones gave a false statement in passing on his credibility. The agency

We affirm the district court's decision, which affirmed the agency in part, reversed the agency in part, and remanded for a recalculation of Jones's healing period benefits under section 85.36(7).

AFFIRMED ON BOTH APPEALS.

Danilson, J., concurs; Doyle, J., concurs in part and dissents in part.

specifically found as follows: "Although claimant failed to inform Menards of his work restrictions when he applied there, he credibly testified he felt fine and did not think he had any limitations. The undersigned declines to conclude claimant was intentionally untruthful and therefore his testimony in this hearing is suspect."

DOYLE, J. (concurring in part and dissenting in part)

I concur with the majority's affirmance on the maximum medical improvement issue, but I respectfully dissent from the majority's affirmance concerning the rate calculation issue.

The agency found that Jones, "who worked four hours per day, was clearly a part time worker, as shown by [Menards's] own records" and that Jones's weekly compensation rate should be calculated pursuant to lowa Code section 85.36(9). Relying on the holding in *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129 (Iowa 2010), the district court concluded the record lacked substantial evidence to support the application of Iowa Code section 85.36(9) because there was no evidence of the usual earnings of other workers in Jones's field. Similarly relying on *Swiss Colony*, the majority concludes the agency's finding was not enough to support the application of section 85.36(9). *Swiss Colony* is distinguishable, and I believe the district court and the majority apply its holding too broadly.

The claimant in *Swiss Colony* worked thirty hours per week. *Id.* at 131. The agency concluded his weekly benefits should be calculated according to section 85.36(9) because he was a part-time employee. *Id.* at 132. This conclusion was based on the agency's belief that "the vast majority of all industries in this state view [forty] hours a week as full-time." *Id.* at 135. In concluding the agency erred in finding that the claimant was a part-time employee, the *Swiss Colony* court distinguished full-time from part-time on the basis of weekly earnings, not the number of hours worked per week. *Id.*

Had the legislature intended to establish the forty-hour week as standard for full-time employment it could have done so. Instead, in section 85.36(9), the legislature necessarily recognized that the forty-hour week is not the standard for *every* industry within the state by making "earnings" the operative factor. As a result, section 85.36(9) is applicable only where a claimant earns less than the usual weekly earnings of a full-time adult laborer in his or her "line of industry."

Id. (emphasis in original, internal citation omitted). Since there was no evidence in the record that the claimant earned less than the usual earnings of a full-time adult laborer in his field, the *Swiss Colony* court made "the inescapable conclusion" the agency's finding that the claimant earned less than a regular full-time laborer was not supported by substantial evidence. *Id.* The court therefore found the claimant's weekly benefits were erroneously calculated under section 85.36(9), and it remanded matter for a recalculation of benefits. *Id.* at 135-36.

To be sure, there is no evidence in this record that Jones earned less than the "usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality." But that is not fatal to application of section 85.36(9) in this case, even in light of *Swiss Colony*. Our workers' compensation statute is to be liberally construed to implement its remedial purposes. *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 394 (Iowa 2009). In that light, I read *Swiss Colony* narrowly, as saying that, in the context of section 85.36(9), the fact that an employee works less than forty hours week, standing alone, does not establish that he or she earns less than the usual

³ This case was tried to the deputy commissioner in February 2010, and his decision was filed in May 2010. Thus, the deputy did not have the benefit of *Swiss Colony*, which was decided on August 6, 2010.

weekly earnings of a regular full-time adult laborer in the line of work in which he or she is injured. See Swiss Colony, Inc., 789 N.W.2d 135-36.

We are not presented with such limited circumstances here. The fact that Jones worked less than forty hours per week was not the sole basis for the agency's finding Jones was a part-time employee. Although the agency noted that Jones worked four hours per day, the agency concluded Jones was a part-time worker "as shown by [Menards's] own records." Those records show Jones applied for a "part-time" position. Menards admitted in an answer to interrogatory that Jones "wasn't eligible for profit sharing because he was a part time employee." All evidence in the record points to the fact Jones was a part-time employee. There is no contradictory evidence. Additionally, Jones testified he was sure Menards had full-time employees. Again, there is no contradictory evidence.

Certainly *King v. City of Mt. Pleasant*, 474 N.W.2d 564, 566 (lowa 1991), established the requirement for a preliminary factual finding of lower earnings prior to the application of section 85.36(9). *See also Swiss Colony, Inc.*, 789 N.W.2d at 136. If the analysis ended here, I would have to concur with the majority. But, the *King* court goes on to state that (what is now section 85.36(9)),

will continue to apply in all cases in which claimant is a prototypical part-time employee. In this latter case, the claimant would almost certainly be earning less than a "regular full-time adult laborer in the line of industry in which the employee was injured."

King, 474 N.W.2d at 567. My reading of King leads me to conclude that a preliminary factual finding of lower earnings is not necessary in cases where the claimant is found to be the prototypical part-time employee. See id. King was

not overruled by *Swiss Colony*. In fact, *Swiss Colony* specifically states: "We do not regard our opinion in this case as establishing new law, but simply applying existing law." *Swiss Colony*, *Inc.*, 789 N.W.2d at 136.

Substantial evidence in the record establishes Jones was a "prototypical part-time employee." The agency was therefore justified in concluding Jones "was clearly a part time worker." As *King* recognizes, a part-time worker necessarily earns less than a full-time worker. *King*, 474 N.W.2d at 567. Having been properly classified by the agency as a part-time worker, it follows that Jones earned less than full-time workers in Jones's field. Therefore, under *King*, a specific preliminary factual finding of Jones's lower earnings was not a prerequisite to the agency's application of section 85.36(9) because the agency found Jones to be a part-time worker. I find this is a sufficient factual finding that Jones would earn less than the usual weekly earnings of a regular full-time laborer and there was no error in the agency's application of section 85.36(9) to determine Jones's weekly rate of compensation. I would therefore reverse the district court's ruling that section 85.36(9) cannot not apply in this case.

I concur with the majority in all other respects.